ORIGINAL

Supreme Court, U.S.
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No. 91-151

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF TEXAS, Petitioner,

v.

PINK WAYNE SLOAN, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, PINK WAYNE SLOAN, asks leave to file the attached petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been allowed to so proceed in both the Third Judicial District Court of Anderson County, Texas and the Court of Appeals for the Twelfth Judicial District of Texas.

Respectfully submitted,

DOUGLAS E. LOWE
Attorney at Law
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(903)723-1403

ATTORNEY FOR RESPONDENT

Affidavit in Support of Motion to Proceed on Appeal
in Forma Pauperis

I, PINK WAYNE SLOAN being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress and that the issues which I desire to present in my Opposition to the Petition for Writ of Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the Opposition to the Petition for Writ of Certiorari are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   No. April 1990, $880.00/monthly salary.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income and

state the amount received from each during the past twelve months.

No.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing?

a. If the answer is yes, described the property and state its approximate value.

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Jarel Anderson. He is my six year old son.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Linda Wayne Sloan

SUBSCRIBED AND SWORN TO before me this 7th, of November, 1991.

Darla S. Cook

Notary Public, State of Texas

DARLA S. COOK
NOTARY PUBLIC
State of Texas
Comm. Exp. 02-28-95

CERTIFICATE OF SERVICE

I, DOUGLAS E. LOWE, a member of the Bar of this Court, hereby certify that on this 7th day of November, three copies of the Motion to Proceed in Forma Pauperis was mailed, first class postage prepaid, to Margaret Portman Griffey, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for petitioner herein. I further certify that all parties required to be served have been served.

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ATTORNEY FOR RESPONDENT

No. 91-151

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF TEXAS, Petitioner,

v.

PINK WAYNE SLOAN, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TWELFTH JUDICIAL DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

REASONS WHY THE PETITION SHOULD BE DENIED..... 1

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT..... 1

II. THE COURT OF APPEALS DID NOT IMPROPERLY EXTEND THE FOURTEENTH AMENDMENT PROTECTIONS SET FORTH IN BATSON TO DE NOVO APPELLATE REVIEW OF THE STATE'S EXERCISE OF PEREMPTORY CHALLENGES TO MINORITY VENIRE MEMBERS..... 2

CONCLUSION..... 7

TABLE OF AUTHORITIES

CASES	PAGE
Anderson v. Bessemer City, 470 U.S. 564 (1985).....	3
Batson v. Kentucky, 476 U.S. 79 (1986).....	passim
Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395 (1991).....	passim
Keeton v. Texas, 749 S.W.2d 861 (Tex.Cr.App.--1988).....	4,5
Sloan v. Texas, 809 S.W.2d 234 (Tex.App.--Tyler 1988).....	passim
Sloan v. Texas, 809 S.W.2d 224 (Tex.Cr.App. 1991)...	5
Whitsey v. Texas, 796 S.W.2d 707, 726 (Tex.Cr.App.--1989).....	3,4,6

CONSTITUTIONS, STATUTES and RULES

U.S. Const., amend. XIV.....	2

No. 91-151

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF TEXAS, Petitioner,

v.

PINK WAYNE SLOAN, Respondent

On Petition for Writ of Certiorari
To the Court of Appeals for the Twelfth
Judicial District of Texas

RESPONDENT'S BRIEF IN OPPOSITION

The respondent[1] PINK WAYNE SLOAN, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Twelfth Judicial District Court's opinion in this case. That opinion is reported at 809 S.W.2d 234 (Tex.App.--Tyler 1988).

REASON WHY THE PETITION SHOULD BE DENIED

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT.

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[1]Respondent will be referred to as "Sloan," and the petitioner will be referred to as "the state."

The sole Question Presented in the petition (p.i) is whether the court of appeals extended the

> Fourteenth Amendment protections set forth in Batson v. Kentucky, 476 U.S. 79 (1986) to include de novo appellate review of the state's explanations for its exercise of peremptory challenges to minority venire members.

Neither the decision below nor the record raises the Question Presented in the petition.

II.

THE COURT OF APPEALS DID NOT IMPROPERLY EXTEND THE FOURTEENTH AMENDMENT PROTECTIONS SET FORTH IN BATSON TO DE NOVO APPELLATE REVIEW OF THE STATE'S EXERCISE OF PEREMPTORY CHALLENGES TO MINORITY VENIRE MEMBERS

The court of appeals did not use de novo review to reverse the district court's decision in this case; therefore, there was no improper extension of the Fourteenth Amendment protections set forth in Batson. When the court of appeals authored its opinion in the present case, there was no Texas or federal Batson specific appellate standard of review. The court of appeals followed Batson to the extent that Batson elucidated an appellate standard of review. The court of appeals gave great deference to the trial court's ruling prior to holding the trial court had abused its discretion in determining the credibility of the prosecutor's race neutral explanation for striking the sole black juror. Sloan v. Texas, 809 S.W.2d 234 (Tex.App.--Tyler 1988). The court of appeals used the same analytical process utilized in the clearly erroneous standard of review. Id. Moreover, only a plurality of the Hernandez court held any reason articulated by the prosecutor,

other than one inherently racial, is deemed "race-neutral". Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395 (1991).

The court of appeals held:

> the reasons given by the prosecutor to support his peremptory challenge of Smith [did] not constitute a reasonable trial related explanation sufficient to rebut Sloan's prima facie case of racial discrimination.

Sloan v. Texas, 809 S.W.2d at 238.

In reaching its decision, the court of appeals acknowledged that great deference should be accorded the trial judge's factual findings. Id. 809 S.W.2d at 237. Nevertheless, the court of appeals considered the record and the undisputed facts and circumstances and found the trial court had abused its discretion by failing to rule that the prosecutor had not rebutted Sloan's prima facie case. Id. Thus, the court of appeals followed the same analytical approach as the clearly erroneous standard of review. Anderson v.Bessemer City, 470 U.S. 564 (1985); Whitsey v. Texas, 796 S.W.2d 707, 726 (Tex.Cr.App.--1989).

The state's assertion that the court of appeals requires a prosecutor to demonstrate bias toward the defendant misinterprets the court's rationale. The court of appeals' finding that "no question was propounded by the prosecutor that sought to discover facts or circumstances suggesting that the juror might lean in favor of Sloan in the trial" must be taken in context of the testimony of the district attorney during the Batson hearing. Sloan v. Texas, 809 S.W.2d at 238.

The only reason the prosecutor gave for striking the only remaining black venire person was she didn't appear interested.

The District Attorney attempted to justify the strike by adding that his office did not "strike blacks as a matter of course or as a systematic way of removing them from the jury." Batson requires the prosecutor give a "neutral explanation related to the particular case [on trial]. [emphasis added]. Id. The prosecution may not "rebut the defendant's case by merely "denying that he had discriminatory motive or affirming his good faith in making individual selections." Batson, 476 U.S. at 98.

This Court in Batson did not establish a particular standard of review to be used by appellate courts in reviewing trial court findings. By way of footnote the court stated

> Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." Batson v. Kentucky, 476 U.S. at 98 n.21.

After Batson, Texas' courts had difficulty clarifying an appellate standard of review to be used in Batson appeals. In Keeton v. Texas, the court set forth a standard of review whereby, the appellate court would consider the evidence in the light most favorable to trial judge's ruling, and then determine whether those rulings are supported by the record. Keeton v. Texas, 749 S.W.2d 861 (Tex.Cr.App. 1988). If the record supports the ruling of the trial judge, it would not be disturbed on appeal. Id.

In Whitsey v. Texas, the court adopted the clearly erroneous, and modified Keeton. However, the court stated that

> "while the nomenclature is different the analysis is essentially the same under each of the three 'standards of review'--clearly erroneous, great deference, supported record- and, in fact, the clearly erroneous and great

deference standards engage in the same level of review." Whitsey v. Texas, 796 S.W.2d 707, 726 (Tex.Cr.App.--1989).

When it dismissed the state's petition, the Court of Criminal Appeals had approximately two years earlier rendered its decision in Whitsey. While the court of criminal appeals in dismissing the State's Petition for Discretionary Review as improvidently granted did not expressly adopt the language or the reasoning of the court of appeals, by implication the court accepted the application of the standard of review of the court of appeals. Sloan v. Texas, 809 S.W.2d 224 (Tex.Cr.App. 1991).

The court in Whitsey relied extensively on Anderson v.Bessemer City, 470 U.S. 564 (1985).

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See e.g. United States v. United States Gypsum Co., supra, 333 U.S., at 396, 68 S.Ct., at 542. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. [emphasis supplied]. Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 433 (CA2

> 1945); Orvis v. Higgins, supra, [180 F.2d 37, 539-540 (CA2 1950)].

Whitsey v. Texas, 796 S.W.2d at 722 (quoting Anderson v. Bessemer City, 470 U.S. 564, 575-576 (1985).

While Hernandez establishes the clearly erroneous standard in appellate review of Batson issues, Justice O'Connor wrote in her concurring opinion, "I write separately because I believe that the plurality opinion goes farther than it needs to in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes." Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d at 414. Therefore, contrary to the state's position, any reason articulated by the prosecutor, other than one inherently racial, is not deemed "race-neutral".

In Keeton v. Texas, the Court of Criminal Appeals cited with approval State v. Antwine, 743 S.W.2d 51 (Mo.1987)

> We do not believe, however, that Batson is satisfied by "neutral explanations" which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, Batson would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote "neutral explanations" which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced Batson.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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